

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

77-1143

To be argued by
ANGELO T. COMETA

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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Pg 5

-----X
UNITED STATES OF AMERICA, :

Appellee, :

Docket No.
77-1143

-against- :

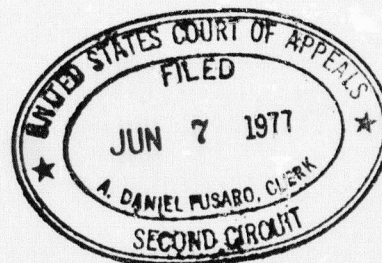
HOWARD E. SAFT, :

Defendant-Appellant. :

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REPLY BRIEF FOR APPELLANT
HOWARD E. SAFT
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PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Defendant-Appellant
40 West 57th Street
New York, New York 10019
(212) 977-9700

Angelo T. Cometa
Sheila Ginsberg
Jonathon Warner
David G. Richenthal,
Of Counsel



UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA, :
Appellee, :
-against- :
HOWARD E. SAFT, :
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REPLY BRIEF FOR APPELLANT
HOWARD E. SAFT

PRIOR TO SENTENCE, APPELLANT HAD
THE RIGHT TO WITHDRAW HIS GUILTY
PLEA ON THE GROUND THAT THE PLEA
PROCEEDING DID NOT COMPLY WITH
THE NEW RULE 11 AND THIS COURT'S
DECISION IN UNITED STATES V. JOUR-
NET.

The government contends that the new Rule 11 does not
control this case because the plea here was taken before this Court's
decision in United States v. Journet, 544 F.2d 633 (2nd Cir. 1976)
(hereinafter referred to as Journet). This argument utterly disre-
gards two crucial facts. Firstly, Journet, supra, added nothing to
the words of the Rule; rather, that case stands only for the

proposition that the new Rule means exactly what its words denote.* Secondly, although his plea antedated Journet, appellant's motion to withdraw his plea preceded his sentence and specifically relied on Journet for withdrawal.

At the time of appellant's motion, there was no rational justification for Judge Pierce's denial of relief. The Judge acknowledged that the proceedings did not comply with the new Rule.** Moreover, there had been only a short delay between the plea and the motion; no intervening trial of co-defendants had occurred; (compare, United States v. Michaelson, Dkt. No. 76-1559 slip. op. 2615, 2620 n. 4 (2d Cir. March 31, 1977)) and witnesses were still available; indeed, appellant's plea had inspired his co-defendant Fialkow to plead guilty, thus providing another potential witness for the prosecution.***

* See Appellant's main brief at 15-20 for a complete discussion of the application of the new Rule 11 to any post December 1, 1975 plea and the retroactivity of Journet.

** In fact, Judge Pierce promised to reconsider his order if this Court found United States v. Journet, 544 F.2d 633 (2d Cir. 1976), retroactive (S.28).

*** Perez v. United States, 77 Civ. 951, 76 Cr. 118 (DBB) (S.D.N.Y. April 15, 1977) relied on by the government (Br. at 28-29) is inapposite in this regard. Perez is a \$2255 proceeding and a motion to withdraw the plea made almost one year after sentence. (Gov't App. at A143-A148) Whatever the standards to be applied to collateral proceedings (Del Vecchio v. United States, Dkt. No. 76-2165, Slip Op. 3719 (2d Cir. May 24, 1977)) and post-sentence motions to withdraw pleas, they are not controlling on a pre-sentence motion to withdraw the plea. F.R.Cr.P. 32(d); Kercheval v. United States, 274 U.S. 220, 224 (1927). Perez did not address the question of whether a district judge has an obligation to apply this Court's explicit mandate to a case still pending before him.

This case comes squarely within the caveat recently articulated by this Court in Del Vecchio v. United States, Dkt. No. 76-2165, slip. op. 3719, 3724-5 (2d Cir. May 24, 1977):

"There should be no doubt after Journet, supra, that on direct criminal appeal there will be little room for minimizing the effect of a failure to comply with Rule 11. Our recent decision in United States v. Michaelson, slip. op. 2615 (2d Cir. March 31, 1977), probably represents the limit of how far we should go in that direction on a direct appeal. The policies behind Rule 11 are important and should be strictly enforced. When a district judge has failed to do so, allowing a defendant to replead will not ordinarily directly clash with society's interest in enforcing the penal laws. Witnesses in most cases will still be available. The price of a short delay and some extra expense is a modest one to pay to correct the error of a government official (a district judge)...."

United States v. Michaelson, supra, does not, as the government contends, retreat from the holding in Journet. The panel in Michaelson explicitly cautioned against such a broad interpretation when it stated, "Our decision therefore is not to be interpreted as overruling Journet in any respect." Id. at 2624. (emphasis supplied) Rather, in Michaelson, a unique set of factors combined to remove the case from the automatic operation of Rule 11: (1) the defendant pleaded guilty after the trial had begun; (2) he sought to withdraw his plea after completion of the trial of his co-defendants; (3) he did not seek to withdraw his plea on Rule 11 grounds; and (4) the

only Rule 11 deficiency -- failure to apprise the defendant of his right to remain silent at trial -- was irrelevant since the defendant throughout expressed his desire and intention to testify. Id. at 2623. None of these factors is present in the instant case.

Despite this Court's commitment to Journet, and the district judge's acknowledgment that appellant's plea was deficient thereunder, the government argues that the conviction should be affirmed because the violations of the Rule were merely "technical". This "harmless error" argument, specifically rejected in Journet, supra, 544 F.2d at 636, conflicts with the plain language of the Rule and necessarily defeats a major congressional purpose in enacting this legislation: to achieve finality of guilty pleas by enumerating the exact prerequisites for a valid plea. Del Vecchio v. United States, supra, slip. op. at 3723; United States v. Journet, supra, 544 F.2d at 635; cf. Blackledge v. Allison, 45 U.S.L.W. 4435, 4441 (May 2, 1977) (Powell, J. concurring). Indeed, the government's lengthy effort to convince this Court that, notwithstanding the deficiencies in this plea*, there has still been substantial compliance with the Rule, bears eloquent witness to the danger that any relaxation of the Rule will inspire the very appellate review of guilty pleas that Congress sought to avoid.

* A detailed explication of these deficiencies is set forth in appellant's main brief at pp. 20-27.

The procedure set out in the Rule requires advice of not only constitutional rights but also other rights and repercussions of the plea that Congress deemed significant. Explication is not in the alternative; each and every matter must be presented to the pleading defendant.

"...as a minimum, before accepting a guilty plea each district judge must personally inform the defendant of each and every right and other matter set out in Rule 11. Otherwise the plea must be treated as a nullity." United States v. Journet, supra, 544 F.2d at 636. (emphasis supplied)

Surely, if Rule 11 and Journet mean what they say, the conviction here must be vacated.

THE DISTRICT COURT'S RELIANCE ON CLEARLY ERRONEOUS FACTS AND THE FAILURE TO HOLD A HEARING REQUIRES REVERSAL OF THE ORDER DENYING APPELLANT'S PRE-SENTENCE MOTION TO WITHDRAW HIS PLEA.

The government maintains that Judge Pierce was right to deny without a hearing appellant's motion to withdraw his plea. This argument is premised, as was the decision below, on two fundamental misconceptions which mandate reversal here.

Critical to Judge Pierce's finding of voluntariness was the mistaken belief that appellant's own motion papers revealed that he had admitted his guilt to his former counsel prior to pleading guilty. The record below contradicts this finding. Nowhere in appellant's

moving papers is there any indication that he confessed to David Fox, who was then his trial counsel. In fact, what appellant's moving papers established is that he consistently maintained his innocence to Fox.

In his own affidavit, appellant describes how he persistently told counsel that he had no prior knowledge of falsity in the statements submitted to the bank and that he never intended to use false statements to obtain the subject loans (Gov't App. A 4, A 11). Additionally, appellant told Fox that he did not know of the false statements in his tax returns (A 19)* Moreover, appellant related how counsel's attempts to extract from him the admission that he had the requisite knowledge and intent were always met by appellant's response that that would be a lie. (A 15)

That counsel may have concluded, on his own, that appellant was guilty or that the government had a strong case does not support Judge Pierce's finding that appellant had confessed to Fox. On this record, that conclusion was clearly erroneous.

At a minimum, Judge Pierce was required to hold a hearing to determine if the allegations in the supporting affidavits were true. United States v. Rogers, 289 F. Supp. 726

* Appellant's actual lack of knowledge was supported on the motion by the affidavit of Jack M. Portney, an accountant who opined that a business man in appellant's position would not have personal knowledge of the facts now claimed to be falsely presented. (Gov't App. A 49-51)

(D. Conn. 1968) (Timbers, Ch. J) Even in the cases relied on by the government -- United States v. Lombardozzi, 436 F.2d 878, (2d Cir.), cert. denied, 402 U.S. 908 (1971) and United States v. Fernandez, 428 F.2d 571 (2d Cir. 1970) -- a hearing was held on the motion to withdraw the plea.

Contrary to the government's allegations on this appeal (Br. at 36n.) appellant did request that a hearing be held (Gov't App. A 22 and A 130). The request was directed at the need to determine whether Fox had ever told appellant that he should not plead guilty unless he believed himself to be guilty.* Appellant strenuously denied that Fox had ever made such a recommendation. (Gov't App. A 130-A131). Clearly, resolution of this conflict was critical to the proper deter-

* The government's claim (Br. at 33 n.) that appellant's current counsel precluded access to Fox's version of the facts is unfounded. In his reply affidavit to the district court, appellant made clear his willingness to have Fox examined about the relevant events:

"In any event - despite suggestions to the contrary - I have not and do not invoke my attorney-client privilege with respect to the facts and circumstances surrounding the plea. As my attorney's letter of November 29, 1976 to the Court makes clear, my former counsel is certainly free to make a full statement of his recollections. It is the forum in which such statement is given that gives me pause. Both my attorney and I believe that it would be inappropriate for Mr. Fox to discuss with the government, evidentiary matters which may be crucial at a future trial. To insure that Mr. Fox is not interrogated about his evaluation of the probative worth of potential evidence, my counsel and I believe that a statement from Mr. Fox, if required, should be made in a judicially supervised forum." (Gov't App. at A 130)

mination of the motion. In United States v. Rogers, supra, 289 F. Supp. at 729, then District Court Judge Timbers granted the motion to withdraw the plea stating:

"Trial counsel doubtless believed that he was acting in the best interest of his client in recommending a guilty plea. A plea bargain had been struck. It was reasonable to assume that a jury would more likely believe a government agent than a convicted felon and narcotic addicts. But to this Court it appears utterly unreasonable for counsel to recommend a guilty plea to a defendant without first cautioning him that, no matter what, he should not plead guilty unless he believed himself guilty."

The reliance on erroneous facts and the failure to hold a hearing requires that the order denying appellant's motion to withdraw his plea be reversed.

CONCLUSION

For the aforesaid reasons and the reasons set forth in Appellant's main brief on appeal, the conviction should be vacated and the case remanded to give Appellant an opportunity to plead anew.

Respectfully submitted,

PHILLIPS, NIZER, BENJAMIN,
KRIM & BALLON
Attorneys for Defendant-Appellant
40 West 57th Street
New York, New York 10019
(212) 977-9700